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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1095

ROBERT QUAGLIATO and
VICTOR ANDREW QUALIATO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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VS.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled cause on March 23, 1965.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit is not yet reported.[1] A copy of the said opinion is hereto attached as Appendix A.

[1] Opinion will probably appear in 342 Federal Reporter, 2nd Series.

JURISDICTION.

The judgment of the Court below is dated March 23, 1965 and was entered on that date.

The jurisdiction of this Court to review the judgment below is invoked under Rule 19 (b) of the Rules of the Supreme Court and under Title 28, Section 1254 (1) U.S.C.A.

QUESTIONS PRESENTED.

1. Where the driver of a truck containing stolen goods, pleads guilty before trial, and there is no testimony that he knew such goods were stolen, or that he had any interest in the truck or its contents, has the substantive crime of "possession of goods and chattels, knowing them to have been stolen" been proved so as to hold his companions guilty as aiders and abettors?

2. Does the following of a truck containing stolen goods with no attributable assistance to the truck driver render the followers guilty of aiding and abetting the possession?

3. Can an instruction, intended for a principal, shown by the evidence to have had possession, but not knowledge of the stolen character of the goods, be extended to include as aiders and abettors, suspects, who may have had the knowledge, but not the possession?

4. Was the repetitious testimony of numerous government agents regarding the course of travel by the truck and the defendants' auto an over-dramatization of what the Government regarded as mere "evasive activity" in their brief so as to prejudice the defendants and deprive them of a fair trial?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The pertinent provisions of the Fifth and Sixth Amendments to the United States Constitution and Title 18, Section 659, U.S.C.A. are attached hereto as Appendix B.

STATEMENT OF THE CASE.

Petitioners, Defendants and Appellants in the Courts below, and a John Ippolito, were charged in the indictment with unlawfully, willfully and knowingly having in their possession on August 26, 1963, at Chicago, Illinois, certain goods and chattels, knowing them to have been stolen, and which were stolen from a motor truck, (not the one involved in the case) which goods and chattels were a part of an interstate shipment of freight from New York State to Minnesota, North Dakota, Colorado, Montana, Wisconsin and Illinois, which goods and chattels were of a value in excess of $100, in violation of Section 659, Title 18 United States Code. The truck driver, John Ippolito, pleaded guilty. The petitioners pleaded not guilty

and were tried by a jury before the Honorable Edwin A. Robson, United States District Judge.

According to the government's witnesses, the goods and chattels were originally in a tractor-trailer, that was removed from the railroard yard on August 20, 1963. On August 26, 1963, John Ippolito driving another motor-truck, was under surveillance by a number of FBI agents in the vicinity of 39th and Normal Streets, in Chicago, Illinois. They were apparently expecting him, but not a Pontiac automobile containing the two petitioners, which they spotted later. The Pontiac automobile followed the truck, sometimes pulling ahead and, at one time stopped alongside, waiting for a traffic light to change. The truck arrived first at the intersection of Fulton and Racine Streets, where the driver was apprehended, and when the Pontiac automobile arrived the petitioners were also apprehended, although they never came in physical contact with the truck, nor its contents. They admitted knowing Ippolito and Robert Quagliato explained why he had borrowed Ippolito's car. Victor Andrew Qualiato, according to one of the agents, said that he had received a telephone call to help unload the truck for which he would be paid several hundred dollars. The assumption was that a "hot load" means stolen. At the close of the Government's case the Petitioners moved for a judgment of acquittal. The Court denied the motion.

Robert Quagliato was the only defendant to take the stand. He explained that he had borrowed the Ippolito car at the latter's suggestion because his wife was taking their car to be repaired; that he was supposed to pick up Ippolito at 39th and Normal, who in turn would drop him off at work; that when he got there Ippolito told him

he had to drop a truck off first. His brother was with him because he had spent the night before at his home. He denied knowing at any time that the articles in the truck were stolen. Mr. Ippolito told him he was taking the tractor and trailer to around Lake and Racine. They did not discuss the route. They stopped and waited from time to time for the tractor and trailer to catch up because the car would go faster than the truck and there was no sense in getting there ahead of him.

At the close of all the evidence in the case the Petitioners again moved for a judgment of acquittal on the ground that there was no evidence that these defendants had possession as charged in the indictment. This motion was also denied. The Court submitted an instruction, over objection, setting forth the elements of the crime charged in the indictment, including that of possession, adding, "or that the defendants knowingly and unlawfully aided, abetted or counselled another person in the commission of the above crime". The jury found both defendants guilty. A motion for a judgment of acquittal and a motion for a new trial was denied. The Court entered judgment on the verdicts and sentenced Victor Andrew Qualiato to one year and Robert Quagliato to two years. Petitioners' appeal to the United States Court of Appeals for the Seventh Circuit followed and resulted in the affirming judgment of that Court sought herein to be reviewed.

REASON FOR ALLOWANCE OF THE WRIT.

The writ should be granted for the following reason:

The opinion of the Court below goes contrary to Justice Sherman Minton's opinion in the case of *United States* v. *O'Brien*, 174 F. 2d 341, 345, and in *United States* v. *Wainer*, 170 F. 2d 603, 606, (both 7th Circuit) and followed in *Pearson* v. *United States*, 192 F. 2d 681, 692 (6th Circuit).

In the case of *United States* v. *O'Brien*, supra, where one Keating was the owner of the truck and O'Brien his companion, Justice Minton said,

> "There may be a suspicion that O'Brien and Keating had the same interest in the truck and in the stolen butter that was found in the truck, but it is only a suspicion and not enough to send O'Brien to the penitentiary".

In the first paragraph of the opinion it is stated that the petitioners together with one John Ippolito were jointly indicted by the grand jury for having in their possession certain goods and chattels of a value in excess of $100, knowing them to have been stolen from a motor truck while being shipped in interstate commerce, in violation of Title 18, U.S.C.A. Section 659. Then the opinion mentions that Ippolito pleaded guilty and the petitioners pleaded not guilty and "Following a jury trial each of them was found guilty of aiding and abetting Ippolito in the commission of the substantive offense charged in the indictment".

There is no evidence that John Ippolito, the supposed principal, knew the goods were stolen or who the truck belonged to. The only testimony was that John Ippolito drove the truck, which was a red Dodge tractor with 1963 license X 7766, and which bore the name The Beier Co. This was not the motor truck, which the opinion states was "being shipped in interstate commerce". We don't know who owned the truck, how the goods got in there, nor anything to connect Mr. Ippolito with either the goods nor the truck, except to say he was the driver. How, then, could a jury find the petitioners "guilty of aiding and abetting Ippolito in the commission of the substantive offense charged in the indictment"? Ippolito did not testify and no one else testified that he knew anything about the contents of the truck nor anything about it being stolen. The only thing the jury was told was that the petitioners were following the truck in a suspicious manner and that all of them were apprehended when they arrived at their destination. Ippolito pleaded guilty, but that does not bind the petitioners nor relieve the Government of the burden of proving that Ippolito, as the principal, knew that the goods and chattels were stolen as charged in the indictment. Furthermore, the plea was not introduced in evidence.

It was held in *Edwards* v. *United States*, 286 F. 2d 681, 683,

> "The basic principle of law is recognized that an aider and abettor may not be guilty in aiding or abetting a principal unless a principal did as a matter of fact commit a crime."

Not only should there be proof that a crime was committed, but there should also be proof of actual participation by those charged with aiding and abetting. The case of *United States* v. *Garguilo*, 310 F. 2d 249, 253, holds:

> "But knowledge that a crime is being committed, even when coupled with presence at the scene, is generally not enough to constitute aiding and abetting".

The Minton rule was also cited in the case of *Pearson* v. *United States,* 192 F. 2d 681, 692, where the alleged aiders and abettors were employees, hired to unload stolen whiskey. This rule protects companions and hirelings from the wrath of the law. These hapless people are on the periphery of crime, but not quite in it. With the aiding and abetting devise operating as a drag net they have very little chance of escaping the brand of criminal unless care is taken to safeguard their precarious rights from a doctrine, which allows a jury to consider any suspicious circumstance, whether essential to the substantive charge or not.

In the instant case the defendants could never be found guilty as principals of the charge of possession, it being apparent that Justice Minton's definition could not apply to them. It was also apparent that the possession of the stolen merchandise was not facilitated in any way by the defendants. However, the undue emphasis on the other aspects of the case and submission of the instruction presenting aiding and abetting as an alternative to finding, among other things, the element of possession, accounted for the jury verdict.

CONCLUSION.

For the reasons hereinabove stated the writ of certiorari prayed for should be allowed and the judgment of the Court below reversed.

Respectfully submitted,

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APPENDIX A

OPINION OF THE COURT BELOW.

In The
UNITED STATES COURT OF APPEALS
For The Seventh Circuit

SEPTEMBER TERM, 1964—JANUARY SESSION, 1965

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 14796 v.
ROBERT QUAGLIATO,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 14797 v.
VICTOR ANDREW QUALIATO,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

MARCH 23, 1965

Before HASTINGS, *Chief Judge*, and KNOCH and SWYGERT, *Circuit Judges.*

PER CURIAM. Defendants Robert Quagliato and Victor Qualiato, together with one John Ippolito, were jointly

indicted by the grand jury for having in their possession certain goods and chattels of a value in excess of $100, knowing them to have been stolen from a motor truck while being shipped in interstate commerce, in violation of Title 18, U.S.C.A. § 659.

Ippolito was adjudged guilty of the substantive offense charged in the indictment following his plea of guilty thereto. He is not a party to this appeal.

Quagliato and Qualiato entered a plea of not guilty. Following a jury trial each of them was found guilty of aiding and abetting Ippolito in the commission of the substantive offense charged in the indictment. Judgment of conviction was entered on the guilty verdict and each was sentenced to the custody of the Attorney General. These appeals followed.

The two appeals were consolidated for briefing and oral argument herein and are considered jointly.

Appellants assert two errors relied upon for reversal, viz: (1) that there was *no evidence* they had possession of the stolen goods or that they aided or abetted Ippolito; and (2) that the trial court gave an erroneous instruction to the jury.

At the trial, the Government presented the testimony of numerous agents of the Federal Bureau of Investigation who testified concerning the entire episode, the activities of appellants and their questioning Qualiato and his admissions (admitted only against him). Quagliato was the only defendant to take the stand and was the only witness produced by defendants.

(Opinion of the Court Below)

It is elementary, of course, that in reviewing the record on appeal we will not weigh the credibility of witnesses, but must view the evidence in the light most favorable to the Government, together with all reasonable inferences which might have been drawn therefrom.

We have reviewed the transcript of the evidence in this case. It is abundantly clear to us that the jury was justified in determining the issue of aiding and abetting as was done in this case. The evidence introduced by the Government amply supports the verdict of the jury.

We have examined the challenged instruction. Either appellants misunderstood the instruction or the objection is trivial. In any event, in our judgment the instruction in question was a correct statement of the law and the trial court did not err in so instructing the jury.

Finding the claims of appellants to be wholly without merit or substance, the judgment of conviction of each appellant is affirmed.

AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The pertinent provision of the Fifth Amendment to the United States Constitution is:

> "No person shall be • • • deprived of life, liberty, or property, without due process of law; • • •"

The pertinent provision of the Sixth Amendment to the United States Constitution is:

> "In all criminal prosecutions the accused shall enjoy the right to a • • • trial, by an impartial jury • • •"

The portion of the United States Code upon which the cause is predicated is:

> Whoever embezzles, steals, or unlawfully takes • • • any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; or
>
> Whoever buys or receives or has in his possession any such goods or chattels knowing the same to have been embezzled or stolen; • • •
>
> Shall in each case be fined not more than $5,000.00 or imprisoned not more than 10 years, or both; • • •

APPENDIX C

From the opinion in *Pearson* v. *United States*, 192 F. 2d 681, 682, citing the decisions of Justice Sherman Minton in the cases of *United States* v. *O'Brien*, 174 F. 2d 341, and *United States* v. *Wainer*, 170 F. 2d 603:

> "As stated by Justice Minton, when he was a member of the Court of Appeals of the Seventh Circuit: "To 'possess' means to have actual control, care and management of, and not a passing control, fleeting and shadowy in its nature." *United States* v. *Wainer*, 7 Cir., 170 F. 2d 603, 606. And in holding that there was not sufficient evidence to sustain a conviction of one who was accused of having in his truck possession of butter, stolen in interstate commerce, with knowledge that it had been stolen, Justice Minton, in *United States* v. *O'Brien et al*, 174 F. 2d 341, 345, said: "he was never seen about the truck exercising any control, dominion, or authority over it, either before or after the stolen butter was found in it. There may be a suspicion that O'Brien and Keating had the same interest in this truck for the occasion and in the stolen butter that was found in the truck, but it is only a suspicion and not enough to send O'Brien to the penitentiary. *United States* v. *Wainer*, 7 Cir., 170 F. 2d 603. If Keating is guilty, the most that can be said of O'Brien is that he was associating with a guilty man."

From the decision in *United States* v. *Garguilo*, 310 F. 2d 249, 253:

> "But knowledge that a crime is being committed, even when coupled with presence at the scene, is generally not enough to constitute aiding and abetting".

From the decision in *Edwards* v. *United States*, 286 F. 2d 681 (1960):

"The basic principle of law is recognized that an aider and abettor may not be guilty in aiding or abetting a principal unless a principal did as a matter of fact commit a crime."

APPENDIX D

Trial Court's charge on the elements of the crime charged and aiding and abetting:

To find the defendants guilty under this indictment, you must find from all the evidence and beyond a reasonable doubt,

1. That on or about August 26, 1963, at Chicago, the defendants unlawfully had in their possession the goods and chattels contained in the indictment.

2. That the defendants knew the goods and chattels were stolen.

3. That the goods and chattels were stolen from a motor truck.

4. That the goods and chattels were part of an interstate shipment of freight.

5. That the value of the goods were in excess of $100, or that the defendants knowingly and unlawfully aided, abetted or counselled another person in the commission of the above crime.

If the Government proves all five of these propositions beyond a reasonable doubt as to the defendant or defendants, that defendant or defendants are to be found guilty by you, otherwise he or they should be found not guilty.